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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 627

LIBBEY-OWENS-FORD GLASS COMPANY, *Petitioner,*

v.

FRANK W. McCULLOCH, GERALD A. BROWN, SAM ZAGORIA, JOHN H. FANNING AND HOWARD JENKINS, JR., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Page

Table of Contents.

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ

1. The Decision of the Court of Appeals Constitutes a Decision on an Important Question of Federal Law Which Has Not Been, But Shold Be, Settled by This Court 8

2. The Court of Appeals Decision Conflicts With the Decision of This Court in Leedom v. Kyne and Other Applicable Decisions of This Court 14

   The Review Procedure of Section 10 of the Act Cannot Substitute for Equitable Relief Where Agency Action in Excess of Statutory Authority Is Shown 18

3. The Decision of the Court of Appeals Is in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Question 20

Conclusion 22

Appendix "A" 1a

Appendix "B" 11a

Appendix "C" 15a

Appendix "D" 31a

Appendix "E" 35a

Appendix "F" 37a

TABLE OF AUTHORITIES

CASES: Page

American Stores Co., 130 NLRB 678 (1961) 4, 10
Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441 16
Boire v. Greyhound Corp., 376 U.S. 473 12
Boyles Galvanizing Co. v. Waers, 291 F. 2d 771 (10th Cir. 1961) 21
Civil Aeronautics Board v. Delta Air Lines, 367 U.S. 316 16
Department Store Employees v. Brown, 284 F. 2d 619 (9th Cir. 1960), cert. den. 366 U.S. 934 21
General Box Co., 82 NLRB 678 (1949) 4
Greensboro Hosiery Mills v. Johnston, 377 F.2d 28 (4th Cir. 1967) 21
Harmon v. Brucker, 355 U.S. 579 (1958) 16
Herald Co. v. Vincent, 392 F. 2d 354 (2nd Cir. 1968) .. 21
Leedom v. IBEW, 278 F. 2d 237 (D.C. Cir. 1960) 21
Leedom v. Kyne, 358 U.S. 184 .....3, 6, 8, 9, 11, 12, 13 14, 15, 16, 17, 18, 19, 20
Local 130, ITU v. McCulloch, 345 F. 2d 90 (D.C. Cir. 1965) 20
Miami Printing Pressmen's Local 46 v. McCulloch, 322 F. 2d 993 (D.C. Cir. 1963) 8, 9, 17
Milk Drivers Local 98 v. McCulloch, 306 F. 2d 763 (D.C. Cir. 1962) 21
Peters v. Hobby, 349 U.S. 331 16
Skinner & Eddy Corp. v. United States, 249 U.S. 557 .. 19
Stark v. Wickard, 321 U.S. 288 16
Uyeda v. Brooks, 365 F. 2d 326 (6th Cir. 1960) 21

STATUTES:

National Labor Relations Act

28 U.S.C. § 1337 ..... 3, 8
29 U.S.C. § 159 .....3, 4, 5, 7, 8, 9, 10, 11, 12, 15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 7, 1968 on which rehearing was denied on July 25, 1968.

OPINIONS BELOW

The decision of the United States District Court for the District of Columbia dated March 11, 1968 is reported at 67 LRRM 2712, 57 LC 12,552 and a copy thereof is appended to this petition as Appendix "A" at pages 1a to 10a.

The opinion of the United States Court of Appeals for the District of Columbia Circuit dated June 7, 1968 is reported at 68 LRRM 2447, 58 LC 12,735, and a copy thereof is appended to this petition as Appendix "B" at pages 11a to 14a. Petition for rehearing was denied on July 25, 1968. The Decision and Order of the National Labor Relations Board dated January 12, 1968 is reported at 169 NLRB No. 2, 67 LRRM 1096, and a copy thereof is appended to this petition as Appendix "C" at pages 15a to 30a.

JURISDICTION

Since this is a petition for review of a judgment rendered in a civil case decided by the United States Court of Appeals for the District of Columbia Circuit on June 7, 1968, rehearing denied on July 25, 1968, the jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal district courts, under principles of equity jurisdiction over agency action in excess of statutory powers, have jurisdiction to enjoin the National Labor Relations Board from conducting elections and certifying new bargaining units in the face of its own finding that no question of representation exists, under circumstances where the National Labor Relations Act in clear and specific terms (Section 9(c)

(1)) requires a finding that a question of representation exists *as a condition precedent* to the conduct of elections and the certification of the results thereof?

2. Whether the Court of Appeals (in ruling that the Labor Board's action directing elections in the admitted absence of a question of representation was not "so plainly beyond" its bounds or "so clearly in defiance" of it to warrant injunctive relief) imposed a different and more stringent standard than the standard established by this Court in *Leedom* v. *Kyne,* 358 U.S. 184, governing the equity powers of the district courts to enjoin or set aside agency action in excess of delegated powers and contrary to express provisions of law?

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1337 and Section 9 of the National Labor Relations Act, 29 U.S.C. § 159, which are set out in full in Appendix "D" to this petition at pages 31a to 36a.

STATEMENT OF THE CASE

This case involves the equitable jurisdiction of the District Court to enjoin agency action in excess of delegated powers. In this case, the Court of Appeals set aside a permanent injunction of the District Court enjoining the National Labor Relations Board from conducting elections and combining bargaining units, where the Board itself had found that the statutory precondition to such action—the existence of a representation issue—had not been met.

This proceeding was initiated by a petition filed by the Union with the Labor Board requesting "clarification" of three separate bargaining units, which were lawfully established and recognized and had been in

existence for years. One of these units is an eight-plant unit,[1] and the other two are separate single plant units, one located in Lathrop, California and the other in Brackenridge, Pennsylvania. The International Union and one or more of several local unions were recognized as the exclusive bargaining agents in the three respective units, and there were and are stabilizing collective bargaining contracts in effect in each unit.

The Union asked the Board to "clarify" these three separate units by consolidating them into a single multiplant unit. The employer objected to this procedure.

The Board in a uniform line of previous cases had held that it had no statutory authority to conduct elections and certify results in the absence of a question of representation. Thus in *General Box Co.*, 82 NLRB 678 (1949), where, as here, the union requesting the election and certification was already recognized, the Board dismissed the petition, holding:

> "The issue here is jurisdictional, as it is only where a question of representation is found to exist that the Board is authorized to proceed to an election and certification in any case arising under Section 9(c)."

This principle was reiterated in *American Stores Co.*, 130 NLRB 678, 679 (1961), where the Board held:

> "In a proceeding such as the proceeding herein, under Section 9(c)(1) the Board may make a unit determination only when it finds that a question concerning representation exists."

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[1] The eight plants are located in Shreveport, Louisiana; Ottawa, Illinois (2 plants); Charleston, West Virginia; Rossford, Ohio (2 plants); and East Toledo, Ohio (2 plants).

The Board, however, proceeded to entertain the petition, and, after hearing, unanimously found that "no actual question concerning representation" existed. The Board also found that the existing units covered by separate agreements were appropriate units and that there was "no justification" for affording absolute power to either one (union or employer) to compel the other to bargain in the three historical units or in a combined unit which might also be appropriate. Ignoring its own rule that one party cannot use economic force to compel bargaining in a unit different from the lawfully established unit or units, however, the Board noted the existence of a "dispute" over the bargaining unit, and, over the strong objection of two of its members, directed elections in the two single plants, but no election in the eight-plant unit. The majority of the Board said that, dependent solely upon the outcome of these elections at the two plants, it would certify the appropriate bargaining units, which would be one of the following: (1) a continuance of the three separate units; (2) a nine-plant unit and a single plant unit; or (3) a ten-plant unit.

Two members of the five-member Board registered their dissent, and held that "authorization for this type of election is completely lacking under the Act", and that since the Board was in agreement that no question concerning representation existed, the Board had no jurisdiction to act, inasmuch as Section 9(c)(1) of the Act authorizes elections only where a question of representation is found to exist. The two dissenting members dismissed as specious the majority rationalization that it had authority to redefine bargaining units or that the Union by unilaterally requesting a consolidation of units had created a jurisdictional basis which did not otherwise exist.

The specific thrust of the two Board dissenters was that the basic statutory scheme requires the existence of a genuine or actual question of representation before the Board has jurisdiction in law to conduct elections or define or redefine bargaining units, or, indeed, to solicit the preference of employees. The majority did not deal with these objections, except to declare that they were convinced they had the necessary statutory authority to act as they did.

The employer then filed an action in the Federal District Court to enjoin the Board from conducting the elections and redefining existing units and representatives on the ground that, under *Leedom* v. *Kyne,* 358 U.S. 184, the Board was exceeding its authority under the Act. The Court, after hearing, so found, and enjoined the Board.

The Board obtained a partial stay in the Court of Appeals, which allowed the Board to proceed with the elections at the two plants, but continued to enjoin any action to consolidate existing bargaining units. The Board proceeded to issue official election notices [2] which stated, *inter alia,* that the elections were representation elections to select bargaining representatives, and instructed employees to vote on the question as to whether or not they wished to be represented as a part of a multiplant unit by the International Union "and its various locals". A "yes" vote on this proposition would mean that the International Union and all of its several locals would be certified as the joint representatives of a combined nine or ten plant unit, in contrast

[2] The election notice, which was appended to petitioner's brief in the Court of Appeals since the election was conducted after the conclusion of proceedings in the District Court, is appended to this brief as Appendix "E" at page 35a.

to the three existing units which are represented by the International and the particular local or locals involved. Thus, the necessary effect of the Board's certification will be not only to combine units but to name new and different representatives for all of the affected employees.

Despite the fact that the Board, itself, denominated the elections as representation elections in its election notices, the Board claimed in its brief in the Court of Appeals that the elections were not representation elections but merely a sampling of employee opinion in two of the ten plants involved.

Following the elections, the Court of Appeals heard the case and reversed the District Court in a 2-1 decision, with a strong dissent by Circuit Judge Tamm. The majority of the Court noted the contention that the Board lacked statutory authority to hold elections and join bargaining units, and further noted that the Board admitted that its "action was novel" and that there was no representation issue to resolve. The majority held, however, that the Board's action in this case "was certainly not so 'plainly beyond' its bounds or 'clearly in defiance' of it" as to warrant injunctive relief by the District Court.

Judge Tamm, dissenting, held that the Board acted in excess of its authority and in clear contravention of Section 9(c)(1) of the Act in conducting elections where, as the Board expressly found, there was no question of representation involved. He further held that the case "illustrates the consistent tendency of administrative agencies to assume and exercise by accretion powers not granted to them specifically or by necessary implication."

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals Constitutes a Decision on an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

In 1959 this Court in *Leedom* v. *Kyne,* 358 U.S. 184 [3] defined the original equity powers of the federal courts under 28 U.S.C. § 1337 to enjoin action by the National Labor Relations Board, which in that case was stated to be "in excess of its delegated powers and contrary to a specific prohibition of the Act." 358 U.S. at 188. In that case the Board had found appropriate for bargaining a unit composed of both "professional" employees and other employees without a prior vote among the professional employees regarding whether they desired to be included in a unit with non-professional employees. This action was taken by the Board despite the express prohibition in Section 9(b)(1) of the Act that the Board "shall not" decide that a unit composed of both professional and other employees is appropriate unless the professional employees voted to be included in such a mixed unit.

In 1963 the United States Court of Appeals for the District of Columbia Circuit in *Miami Printing Press-*

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[3] The question of equity powers of the federal courts to enjoin action of the National Labor Relations Act in representation cases in excess of statutory authority was originally reserved by this Court in American Federation of Labor v. NLRB, 308 U.S. 401. Since Leedom v. Kyne, this Court in McCulloch v. Sociedad National, 372 U.S. 10, upheld an injunction against the Board's assertion of jurisdiction over crews of foreign flag vessels. In the other case relating to Labor Board action in claimed excess of its authority, Boire v. Greyhound Corp., 376 U.S. 473, the Court overturned an injunction against the Board's conduct of a representation election on the ground that no Board action in excess of statutory authority was shown in that case.

men's Local 46 v. *McCulloch,* 322 F.2d 993, (D.C. Cir. 1963), held that this Court's *Leedom* v. *Kyne* rationale covered a situation in which the action of the Board was in violation of a clear *mandatory* statutory provision.

The present case involves a situation where the statutory limitation on agency actions is equally clear, but expressed somewhat differently from either the "express prohibition" or the "express mandate"—either the "thou shalt not" or the "thou shalt". Thus, it is not squarely settled by this Court's decision in *Leedom* v. *Kyne.* Here, Section 9(c)(1) of the Act in clear and specific terms requires a Board finding that a "question of representation" exists as a condition precedent to the conduct of elections and the certification of results thereof.[4] That statutory prerequisite or precondition was, as the Court of Appeals correctly observed in this case, not present by the Board's own admission. The two dissenting members of the Board, the District Court and the dissenting Circuit Judge all found that the Board's action was thus in excess of its authority under the Act. The two Circuit Judges forming the majority for the Court of Appeals decision declined to pass on this issue, holding instead that the Board's action was "not so 'plainly beyond' its bounds or so

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[4] "Whenever a petition shall have been filed . . . the Board shall investigate such petition and *if it has reasonable cause to believe that a question of representation affecting commerce exists* shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that a question of representation exists,* it shall direct an election by secret ballot and shall certify the results thereof" (Emphasis added).

'clearly in defiance' of it" as to warrant judicial intervention.

There is little or no question but that the Board's action here was in excess of its statutory powers. The Board itself has previously ruled uniformly that the existence of a "question of representation" is a statutory, jurisdictional prerequisite to the conduct of elections and certification of results. See, *e.g., General Box Co., supra* and *American Stores Co., supra.*[5]

Here, however, the Court of Appeals upset a District Court injunction against the Board, apparently because the statutory requirement, termed "jurisdictional" by the Board in the *General Box* case (that a question of representation must exist before the Board can conduct the elections or certify the results), is not phrased in mandatory "shall" or "shall not" language, but rather is stated in terms of a statutory prerequisite or precondition of holding an election or certifying the results. However, the statutory objective and intent is no less clear when phrased in terms of a condition precedent than when phrased in terms of what the Board "shall" or "shall not" do. The granting of equitable relief to enjoin agency action in excess of statutory authority only where the magic "thou shalt" or "thou shalt not" words appear results in an artificial rule based on semantics and, in effect, places a wholly un-

[5] The Board's contention, made for the first time in its brief to the Court of Appeals, that its action was authorized by Section 9(b) of the Act is wholly without foundation. The Board's duty to decide the appropriate unit under Section 9(b) is limited by the procedures and requirements found in Section 9(c) that there be a question of representation before the holding of an election or certification of results. The Board itself so stated in the *American Stores* case, *supra*. Section 9 should be read as a whole in determining the Board's authority.

justified limitation on the powers of the courts. The decision of this Court of Appeals setting aside an injunction issued by the District Court indicates that the question of the powers of the District Courts to enjoin agency action in excess of delegated powers, which is clearly disclosed but not expressed in mandatory "shall" or "shall not" verbiage, has not been finally settled by the decision in *Leedom* v. *Kyne*. Not only are the several circuit courts of appeals in disagreement on the application of *Leedom* v. *Kyne* to this particular situation, but the decision of the courts below in this case show confusion, uncertainty and disagreement as to the appropriate standard of adjudication.

A pertinent analogy to the issue presented here is found in another part of Section 9(c)(1) of the Act, which provides that: "Whenever a petition shall have been filed . . . the Board shall investigate such petition . . ."[6] Surely if the Board proceeded to investigate an alleged representation dispute in the absence of a petition being filed, which Section 9(c)(1) makes a condition precedent to such investigation, a district court would have equity powers to enjoin such a clear trans-

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[6] Another pertinent analogy is found in the co-ordinate statutory authority of the Board to remedy unfair labor practices under Section 10 of the Act. Section 10(b) provides:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have the power to issue and cause to be served on such person a complaint stating the charges in that respect . . ."

The requirement that there be a charge prior to issuance of a complaint is a clear, specific and important statutory limitation on the Board, preventing its assumption of power to initiate unfair labor practice complaints against persons on its own motion. It is unlikely that anyone would question the power of the Courts to enjoin an attempt by the Board to ignore or by-pass the jurisdictional requirement that a charge be filed.

gression of the Act.[7] This is so despite the fact that the legislative intent is manifested and verbalized in the form of a condition precedent rather than in the form of a "shall" or "shall not" command. Yet, under the majority decision of the Court of Appeals in this case, presumably no equitable relief would be allowed. Surely this Court did not intend in *Leedom* v. *Kyne* to straight-jacket legislative draftsmanship by requiring legislative intent to be evidenced exclusively by "shall" or "shall not" directives in order for clear Congressional intent to be vindicated by the courts in injunctive proceedings.

This case is not one like *Boire* v. *Greyhound Corp.*, 376 U.S. 473, where a routine mixed question of fact and law (whether Greyhound and a maintenance contractor were "joint employers" of the employees) was involved, which is peculiarly susceptible of resolution through the full review procedures of Section 10 of the Act. Here the issue is a pure one of law—whether the Board acted in excess of the clear and specific provisions of Section 9(c)(1) when it conducted representation elections in the admitted absence of a question of representation.

The time has thus come for this Court to make plain that agency action clearly in excess of delegated statutory authority may be enjoined by the federal courts, whether it involves (1) a violation of an express pro-

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[7] The Sixth Circuit Court of Appeals has recently recognized that presumptively a complete failure by the Board to "investigate" the petition, as required by Section 9(c)(1) in another statutory condition precedent to the holding of an election or certification "would invalidate the Board's direction of election". Modern Plastics Corp. v. McCulloch, F. 2d , 69 LRRM 2133 (6th Cir. 1968).

hibition of the Act, (2) a failure to perform an express mandate of the Act, or (3) as in this case, a failure to observe clear and unambiguous statutory requirements and conditions precedent to agency action. While the Court of Appeals appears to accept the applicability of *Leedom* v. *Kyne* in the first two situations, the Court, overruling the District Court, has negated its application to the equally meritorious third category—where there is a failure to observe a statutory prerequisite to agency action.

The issue is one of critical importance and recurring frequency. As dissenting Circuit Judge Tamm noted:

> "The case illustrates the consistent tendency of administrative agencies to assume and exercise by accretion powers not granted to them specifically or by necessary implication."

Maintenance of the proper relationship between Congress and the administrative agencies created by Congress requires, at a minimum, that federal courts have the power to enjoin such agencies from conduct clearly in excess of statutory authority.

There is an added importance to the issue when the clear Congressional policy of requiring that a "question of representation" exist prior to Board election or certification is understood. The requirement is not simply a technical matter of procedure. It is, rather, a matter of basic importance in the entire structure of the Act. It is a limitation on the Board from deciding representational issues in a vacuum and against acting as a self-starting initiator of basic restructuring of bargaining units and employee representation. By requiring that a "question of representation" exist, Congress meaningfully and intentionally restricted the Board's role in employee representation issues to situations

where an actual question existed. That question, by the Board's own admission is lacking here Despite its confessed absence, the Board has in this case authorized elections leading to a basic change in the representation of nearly 9,000 employees in this nationwide Company, consolidating all employees in the Company into a single bargaining unit represented by a single union and "various" of its locals, whereas prior to the Board's action such employees were represented in three separate local bargaining units, each with its own local union or unions representing employees in such units. One significant practical effect of this action, as shown in the record, is to create a representation situation in which a single committeeman from any one of the ten plants can veto a multiplant agreement even if acceptable to all of the other representatives of the employees in the multiplant negotiations.[8]

The Board's gratuitous intrusion into the delicate and complex structures of bargaining in the admitted absence of a question of representation, illustrates graphically the importance of the clear and specific Congressional limitation which the Board has overrun in this case.

2.

The Court of Appeals Decision Conflicts With the Decision of This Court in Leedom v. Kyne and Other Applicable Decisions of This Court

The Court of Appeals decision conflicts with *Leedom* v. *Kyne, supra.* While that case involved a specific prohibition of the Act, its statement of issue and ration-

[8] Counsel for petitioner is advised that since the Board's decision in this case there have been many other attempts to invoke the Board's aid in enlarging and consolidating bargaining units where no question of representation exists.

ale reached all agency action in excess of statutory authority. Thus the Court concluded that: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

The Court of Appeals in this case held by a 2-1 majority that the District Court had no jurisdiction to entertain the complaint. The majority noted the contention, upheld by the District Court, that the Board lacked the requisite statutory authority to "hold elections and join bargaining units" in the admitted absence of a question of representation, and also noted the Board's contention that it had the authority under Section 9(b), but then stated that the majority "intimates no opinion on this claim for we find that the District Court lacked authority to entertain it." (Appendix, p. 12a) The dissenting Circuit Judge, as well as the District Judge, and two of the five members of the NLRB, who did consider this claim of lack of statutory authority, found that the Board majority had exceeded its statutory authority. The majority of the Court of Appeals, declining to pass judgment on this issue, held instead that the action of the Board was not "so plainly beyond" the bounds of the Act or "so clearly in defiance" of it as to justify injunctive relief.

In departing from and restricting the *Leedom* v. *Kyne* standard the Court of Appeals placed itself in conflict with that decision.

The critical issue presented in this case is whether the action of the Board which the District Court enjoined was in excess of the Board's statutory authority. The District Court held that the Board had exceeded

its authority. In declining to pass on this critical, and in our view controlling issue, the Court of Appeals refused to rule on the crucial question which *Leedom* v. *Kyne* mandates the courts to consider. Moreover, by improvising a different standard, (requiring a showing sufficient to convince the Court that the Board's action was "so plainly beyond" the Act or "clearly in defiance" of it) the Court clearly substituted a standard of its own which is more restrictive and less definitive than the standard of *Leedom* v. *Kyne.*

The Court of Appeals decision also runs contrary to the several cases decided by this Court involving administrative agencies other than the Labor Board, where the Court has granted injunctive relief against agency action in excess of delegated powers. See, *e.g., Harmon* v. *Brucker,* 355 U.S. 579, 581-582 (1958) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). *Peters* v. *Hobby,* 349 U.S. 331, 345 ("Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority"); *Stark* v. *Wickard,* 321 U.S. 288, 309, ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted"). *Board of Governors of the Federal Reserve System* v. *Agnew,* 329 U.S. 441, 444 (". . . [T]he extent of the authority granted the Board to issue removal orders under § 30 of the Act is subject to judicial review and . . . the District Court is authorized to enjoin the removal if the Board transcends its bounds and acts beyond the

limits of its statutory grant of authority"); *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316, 322 ("... [T]he Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do").[9]

The equitable jurisdiction of the Courts to enjoin agency action in excess of delegated powers is, as noted in *Leedom* v. *Kyne, supra,* admittedly narrow. It is, however, an important and significant element of judicial power in a free society. While the road to judicial relief is narrow, the Court made it plain in *Leedom* v. *Kyne,* which took its place in a long line of decisions of similar import, that it did not intend that the road be closed. The "standard" applied by the Court of Appeals in the present case virtually closes the road to judicial intervention and prescribes a "standard" which calls for a showing of something more than agency action clearly in excess of statutory powers. What that something more might be is not clearly defined. By reference to the decision of the same Court of Appeals in *Miami Pressmen, supra,* and its decision in this case, it appears that the Court below reads *Leedom* v. *Kyne* as requiring that there be a violation of a clear mandatory requirement or a clear negative prohibition, expressed in mandatory "thou shall" or "thou shall not" language. This interpretation rules out any equitable jurisdiction where the intent of Congress is equally plain, although differently expressed

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[9] Although the Delta case involved a petition for review, not an original suit in equity to strike down unauthorized agency action, the rule with respect to Board action in excess of statutory authority is directly applicable here.

in terms of a statutory condition precedent to agency jurisdiction, which is precisely the situation presented in this case. This interpretation conflicts with *Leedom* v. *Kyne,* and with the opinion of other Courts of Appeal.

Moreover, the Court below incorporates a standard which is so ill-defined and subjective as to afford little or no guidance to the District Courts, which have nothing more to guide them than the Court of Appeals admonition that the agency action in question must be "so plainly beyond the bounds" as to warrant injunctive correction. A standard so expressed is no standard at all, since it calls for a purely subjective judicial reaction as to the enormity of agency transgression rather than providing an objective measurement for the District Courts to apply. Here, the Court of Appeals appeared to believe that the Board might well have acted in excess of statutory authority, but nonetheless felt that the action was not "so plainly beyond the bounds" as to call for the invocation of *Leedom* v. *Kyne.* This places a gloss of uncertainty and ambiguity on the application of *Leedom* v. *Kyne* which is unjustified by the plain meaning of this Court's decision in that case. It is submitted that a clear showing, derived from the words of the statute itself, that the agency has exceeded its statutory powers is all that *Leedom* v. *Kyne* requires.

The Review Procedure of Section 10 of the Act Cannot Substitute for Equitable Relief Where Agency Action in Excess of Statutory Authority Is Shown

The underlying principle of *Leedom* v. *Kyne* is that attempted assertion of agency jurisdiction in excess of its delegated powers has no basis in law and can be struck down at its inception. Basic to the concept of equitable jurisdiction is the recognition of the right of

a citizen to invoke the authority of the Courts to free himself from attempted regulation which is plainly in excess of delegated powers.

Petitioner has no adequate remedy at law to protect it from the irreparable injury that it will suffer if the decision of the Court of Appeals is allowed to stand.

The review procedures of Section 10 are designed to come into play in cases where the Board acts within its statutory authority but may have made an erroneous assessment of the facts or an erroneous application of the law to the particular facts before it. But, as this Court held in *Leedom* v. *Kyne,* these review procedures have no application where the "suit is not one to 'review', in the sense that term is used in the Act, a decision of the Board made within its jurisdiction." This suit, as the Court said of the suit in *Leedom* v. *Kyne,* "is one to strike down an order of the Board made in excess of its delegated powers . . ." 358 U.S. at 188. If the agency action here is plainly in excess of delegated powers, as the District Court found, the review procedures of Section 10 are irrelevant and cannot operate to deprive the courts of original jurisdiction to stay the action of the Board. See *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 562 ("But plaintiff does not contend . . . that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission.")

It would be a denial of the traditional and time-honored equitable powers of the courts to hold that

the existence of ultimate review procedures deprives the courts of jurisdiction to protect against an unwarranted assertion of jurisdiction which is in excess of delegated powers.

3.

The Decision of the Court of Appeals Is in Conflict With the Decisions of Other Circuit Courts of Appeal on the Same Question

Since the decision of this Court in *Leedom* v. *Kyne, supra,* the Courts of Appeal in all but one of the circuits have rendered decisions interpreting this Court's decision in that case. A compendium of twenty-three of these rulings is contained as Appendix "F" to this brief at pages 37a to 43a.

The significance of these cases is two-fold. First, they demonstrate that the issue is far from settled and that it is likely that these cases will continue to arise in the federal courts until this Court gives more definitive guidelines for the district courts to utilize in determining their jurisdiction in cases of this kind.

Secondly, these cases demonstrate that the circuit courts are presently utilizing a wide variety of different standards—all in the name of *Leedom* v. *Kyne*—to determine the jurisdiction of district courts to enjoin Board action in excess of its statutory authority. In some instances different standards are used in different cases by the same circuit court.

The standard for declining jurisdiction utilized by the Court of Appeals in this case was that:

> "The Board's action . . . was certainly not so 'plainly beyond' its bounds or so 'clearly in defiance' of it." Citing *Local 130, ITU* v. *McCulloch,* 345 F.2d 90 (D.C. Cir. 1965).

This subjective and ill-defined standard is to be contrasted with the standard utilized by the Ninth Circuit in *Department Store Employees* v. *Brown,* 284 F.2d 619 (9th Cir. 1960), cert. den. 366 U.S. 934, the Tenth Circuit in *Boyles Galvanizing Co.* v. *Waers,* 291 F.2d 771 (10th Cir. 1961) and the District of Columbia Circuit itself in *Milk Drivers Local 98* v. *McCulloch,* 306 F.2d 763 (D.C. Cir. 1962), and *Leedom* v. *IBEW,* 278 F.2d 237 (D.C. Cir. 1960), that there need only be a showing of "unlawful action by the Board by way of a departure from statutory requirements or those of due process." Measured under that standard the Board's action here is clearly enjoinable.

Likewise, the Board's action here would be clearly enjoinable under the Fourth Circuit's standard in *Greensboro Hosiery Mills* v. *Johnston,* 377 F.2d 28 (4th Cir. 1967), that there must be a "clear violation by the Board of a provision of the Act." The same result would follow under the Second Circuit's similar standard in *Herald Co.* v. *Vincent,* 392 F.2d 354 (2nd Cir. 1968), that "a district court may intervene when the Board has acted clearly contrary to the statute."

The same is true under the Sixth Circuit's alternative test specified in *Uyeda* v. *Brooks,* 365 F.2d 326 (6th Cir., 1960), that "District Courts have jurisdiction over representation matters only when it is shown that the National Labor Relations Board has acted in excess of its delegated powers *or* in contravention of a specific prohibition in the Act" (Emphasis added).

The appendix graphically illustrates the confusion and conflict in the Circuit Courts of Appeal on the proper standard for equity jurisdiction.

CONCLUSION

For the above specified reasons, the Petitioner respectfully prays that this Court grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX "A"

[¶ 12,552] Libbey-Owens-Ford Glass Company, Plaintiff v. Frank W. McCulloch et al., Defendants.

United States District Court, District of Columbia. No. 507-68. March 11, 1968.

Arnold F. Bunge, Toledo, Ohio, and Guy Farmer, Washington, D. C., for Plaintiff.

Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Solomon I. Hirsh and Laurence H. Silberman, Attorneys, National Labor Relations Board, for Defendant.

[*Statement of Case*]

HART, D. J.: This cause came in to be heard on March 8, 1968, on plaintiff's motion for summary judgment in its favor and upon the motion of the Defendants to dismiss the complaint the Court having heard argument, considered the memoranda submitted by the parties, and being fully advised in the premises, makes the following findings of fact and conclusion of law.

Findings of Fact

The pleadings and exhibits annexed thereto, together with the affidavit filed herein show, and the parties agree, that no genuine issue as to any material fact exists. Based thereon, the Court finds as follows:

1. Plaintiff, Libbey-Owens-Ford Glass Company is a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its office and principal place of business in the City of Toledo, Lucas County, Ohio, and is engaged in an industry affecting commerce within the meaning of 29 U. S. C. Sections 142(1), 152(6) and 152(7).

2. The individual defendant, Frank W. McCulloch is Chairman and a member of the National Labor Relations

Board, and the other defendants Gerald A. Brown, Sam Zagoria, John H. Fanning and Howard Jenkins are members of said Board, and all of the individual defendants together constitute the National Labor Relations Board and will sometimes hereinafter be referred to as the "Board."

3. United Glass and Ceramic Workers of North America AFL-CIO-CLC, hereinafter sometimes referred to as the "Union" is a voluntary unincorporated labor organization within the meaning of 29 U. S. C. § 152(5), and has several locals. During previous years said Union has at times been known as "Federation of Flat Glass Workers", "Federation of Flat Glass Workers of America", "Federation of Glass, Ceramic and Silica Sand Workers of America-CIO", and "United Glass and Ceramic Workers of North America, CIO-CCL". This Union has, over a period of years, been the collective bargaining agent for some of the employees of plaintiff.

4. Plaintiff is now and at all times material herein has been principally engaged in the manufacture and sale of raw flat glass and glass products manufactured therefrom.

[*Petition for Clarification of Certification*]

5. On July 13, 1966, the Union filed its "Petition for Unit Clarification" with the Regional Board for the Sixth Region. That Board assigned Case No. 6-UC-4 to the proceedings. A copy of said petition is attached to the complaint filed herein. The petition recited the existence of a separate multiplant bargaining unit consisting of eight of the plaintiff's plants and two separate single plant bargaining units at the plaintiff's Lathrop, California and Brackenridge, Pennsylvania plants. The petition requested the Board to join the Lathrop and Brackenridge plants to the multiplant unit. A hearing on the "Petition for Unit Clarification" was held at Pittsburgh, Pennsylvania on September 8th and 9th, 1966. At the opening of the hearing the Union made an oral amendment to the petition

correcting the description of the three existing bargaining units and clerical errors in the spelling of the plaintiff's name and the description of the proposed new bargaining unit. Plaintiff objected to the proposed unit and the procedure which was being followed, and called attention to the Board's contract bar rule under which the Board will not accept a representation petition filed less than 60 days nor more than 90 days before the expiration date of a current contract. The Union did not file a representation petition for certification as provided in Section 9(c) of the Act, there being no question of representation, and the Board did not conduct a representation hearing or order a representation election.

[*NLRB's Decision*]

6. On January 12, 1968, the Board, with two members dissenting, issued a Decision and Direction of Elections reported at [1968-1 CCH NLRB ¶ 22,052] 169 NLRB No. 2, finding that either the existing eight-plant unit and that the two existing separate plant units were appropriate or that a nine-plant unit consisting of the existing eight-plant unit together with either one of the two separate units was appropriate or that a ten-plant unit consisting of the existing eight-plant unit together with both of the separate plant units was appropriate, dependent upon the wishes of the employees in the separate plant units and ordered separate elections among the employees of Brackenridge and Lathrop plants to determine whether such employees wished to become a part of the existing eight-plant unit or wish to continue as separate plant units. The two dissenting members of the Board found that since the elections ordered were not representation elections under Section 9 of the Act, "Authorization of this type of election is completely lacking under the Act." The Board did not order any elections in any of the eight plants in the eight-plant unit. While the Board found that there was a long history of collective bargaining on the three unit basis and separate

contracts had continually been signed by the Union and Plaintiff for each of the separate units, that no demand for inclusion of the Lathrop plant in the eight-plant unit was made until 1961 or inclusion of the Brackenridge plant until 1965, that there is no basis for concluding that the operations of the various plants are integrated, that Plaintiff had not only failed to agree to a merger of the three separate units but has vigorously opposed it, that the Board has consistently held that separate historical units do not automatically merge where the operations are not integrated or there is no indication that the parties mutually intended to effect consolidation thereof, that in this case there is no actual question concerning representation, that there does not appear to be any justification for affording absolute power for either one to compel the other to bargain in the three historical units, that the Board has long given some weight to employee impression of preference determined through self-determination elections notwithstanding that nowhere in the statute are they specifically mentioned or specifically authorized except as to elections in certain situations involving craft and professional employees, they held that the appropriate unit or units should be determined by separate elections in the Lathrop and Brackenridge plants only and failed to give any of the employees in any of the plants in the eight-plant unit a right to vote or have any voice in the matter. On January 31, 1968, Plaintiff duly filed with the National Labor Relations Board its Motion for Rehearing and Reconsideration and Oral Argument pointing out the various errors in the Board's Decision, said motion being overruled by the Board by order dated February 13, 1968.

[*Plants of Employer*]

7. At the time of the filing of the "Petition For Unit Clarification" plaintiff owned and operated 11 plants. One of these plants, *Plant No. 11* located in Rossford, Ohio, had no union representation. The employees in eight of the

plants, *Plant No. 1,* in Charleston, West Virginia; *Plant No. 2,* in Shreveport, Louisiana; *Plant No. 4,* in Toledo, Ohio; *Plant No. 5,* in Ottawa, Illinois; *Plant No. 6,* in Rossford, Ohio; *Plant No. 7,* in Ottawa, Illinois; *Plant No. 8,* in Toledo, Ohio and *Plant No. 9,* in Rossford, Ohio were represented by the Union as a multiplant unit, with the exception of window glass cutters, who were represented by another union. These plants, together with a plant in Parkersburg, West Virginia, were grouped together in a single employer-wide bargaining unit certified by the Board on January 30, 1939 (10 NLRB 1470). At the time of the certification the plaintiff had only nine plants, all of which were included in the original certified unit. In a representation hearing subsequently conducted by the Board and reported in 31 NLRB 243, there were two unions involved. The Union here involved took the position that all of the plants of plaintiff should be included in the bargaining unit, or in lieu thereof, as many of the plants as possible. The other union and plaintiff contended that there should be a single unit for the employees at each plant or in the alternative, one bargaining unit for the employees at Parkersburg, and another for the employees at all the other plants. The Board adopted the plaintiff's alternate proposal and established one separate unit for Parkersburg and combined the other eight plants presently in the eight plant multi-bargaining unit into a separate multiplant unit as requested by the parties. At the time of the filing of the petition in present case the Union and the plaintiff had a contract covering this multiplant unit and expiring on October 25, 1968.

8. The employees in *Plant No. 16,* in Brackenridge, Pennsylvania, had been established as a separate bargaining unit in 1936. When this plant was purchased by plaintiff in 1943 and ever since that time the Union and plaintiff have considered the employees in this plant as a separate unit and have had a separate contract covering the employees in that plant. After the hearing in this case the

Union and the Company continued to bargain for the employees in this plant as a separate unit and executed a new contract covering these employees effective October 1, 1966 and expiring October 1, 1969.

9. In 1962 plaintiff completed construction of another *Plant No. 10* in Lathrop, California and by agreement with the Union after a showing of cards, established a separate plant bargaining unit for the employees in this plant. At the time of the hearing, plaintiff and the Union had a contract covering these employees as a separate plant unit and expiring on June 1, 1969.

10. Since the time of the hearing plaintiff completed another plant, *Plant No. 12,* at Mason City, Iowa. On August 10, 1967, this same Union filed a petition with the National Labor Relations Board for the Eighteenth Region asking to be certified as the collective bargaining agent for the production and maintenance employees in that plant as a separate unit. No claim was made that these employees should be included in the multi-plant unit. Subsequently plaintiff agreed to a single plant unit and consented to a Board conducted representation election to be held in that separate unit on December 1, 1967. The election was held; the Union won and was certified by the Board on December 8, 1967 as the collective bargaining agent for that separate unit.

11. Plaintiff, through a separately owned subsidiary corporation, is now also engaged in the construction of another plant in Canada.

[*General Considerations*]

12. Each of the three separate units involved in this proceeding is covered by an unexpired labor agreement of long duration, the earliest termination date being October 25, 1968.

13. There has been a long history of collective bargaining between the plaintiff and the Union on the basis of three separate units.

14. The bargaining unit at the Lathrop, California plant is 2,267 miles from the plaintiff's home office in Toledo, Ohio and 1,965 miles from the nearest plant in the multiplant unit in Ottawa, Illinois. The bargaining unit in the Brackenridge, Pennsylvania plant is 240 miles from plaintiff's home office in Toledo, Ohio.

15. There is no interchange of employees between those in the eight plant multiplant unit and the Lathrop unit or the Brackenridge unit.

16. While the general labor policies of plaintiff are under the supervision of Melvin B. Burwell, plaintiff's Vice President, Employee Relations, the Lathrop plant and the Brackenridge plant each handles its own labor relations. Hiring, firing, disciplining and work assignments, as well as the day-to-day labor problems arising in these plants, are handled by the local management. Home office management only gets into their labor problems when they reach the end of the grievance procedure or during contract negotiations. The operations of each of these plants is autonomous in nature.

17. There is no interdependence between the Brackenridge plant, the Lathrop plant and the plants in the multiplant unit.

18. There are also substantial differences between the labor agreements of the various units.

19. There is a wide difference between the products manufactured at the Brackenridge plant and in the skills and jobs in that plant and those in the other plants.

20. There is no social relationship or other community of interest between the employees in the various units.

21. There is a difference between the labor market as well as product competition in the various areas where the different units are located.

22. The bargaining history in the industry over a long period of years demonstrates an industry practice by mutual consent to recognize both multiplant units and separate plant units. This practice is found not only in the plaintiff's operations, but also in the operations of its competitiors, Pittsburgh Plate Glass Company, Permaglass, Inc., and American-St. Gobain Corporation.

23. The combination of the three units authorized by the Board in this case will not result in either an employer unit, craft unit, plant unit, or subdivision of a plant unit but would result only in a multiplant unit, which is less than employer-wide in scope, without agreement of plaintiff with the Union.

[*Request for Injunctive Relief*]

24. On February 27, 1968, Plaintiff filed its complaint in this Court alleging that the defendants, Chairman and Members of and constituting the National Labor Relations Board exceeded the scope of their statutory authority in making its Decision and Direction of Elections of January 12, 1968 and that the same are arbitrary, capricious, constitute a gross abuse of discretion, are in excess of their statutory jurisdiction, authority and limitations, were made without the procedure required by law, and deprive Plaintiff of its constitutional right to due process and the equal protection of the law; that the consequence of that decision, if allowed to stand would impair the interest of the public by burdening and obstructing commerce through strikes and other forms of industrial unrest and by destroying the equality of bargaining power and giving the Union an undue monopolistic advantage; that in making such decision the Board unlawfully, arbitrarily and capriciously failed to follow the applicable statutory procedures of its

own rules and regulations and denied to plaintiff due process and equal protection of the law guaranteed to Plaintiff by the Constitution of the United States; that by reason of the unlawful action by the defendants Plaintiff has been, is now, and in the future will be denied protection given to it by virtue of said laws and the Constitution of the United States, will be compelled to expend a great deal of time and money to carry out and comply with the decision and order of the Board, will be hampered and hindered in its bargaining with the Union and will suffer loss and expenses which it will have no means of recovering, and will suffer irreparable damage; that Plaintiff has no adequate remedy at law and has no means of redress of the wrongs whereof it complains and that Plaintiff has exhausted its administrative remedies. Plaintiff prays that the defendants, their officers, agents and attorneys be enjoined from holding the elections directed and ordered by defendants and that Plaintiff may recover its costs herein expended and have such other and further relief to which it may be in law or equity entitled. On March 4, 1968 Plaintiff filed in this Court a motion for summary judgment in its favor and on March 6, 1968, the defendants filed their motion to dismiss the complaint. On March 8, 1968, the Court heard both motions, finding that Plaintiff was entitled to a summary judgment in its favor and upon the basis of the foregoing finding of fact makes the following conclusions of law.

Conclusions of Law

1. This Court has jurisdiction to hear and determine the instant case.

2. In directing an election in the instant case among employees of the plaintiff in its plant in Lathrop, California and Brackenridge, Pennsylvania to determine whether such employees preferred to remain in separate bargaining units or to join an existing eight-plant bargaining unit, in the absence of a "question of representation" as that term

is found in Section 9(c)(1) of the National Labor Relations Act, 29 U. S. C. § 159(c)(1), the National Labor Relations Board acted in excess of and contrary to the statutory authority conferred on it in the National Labor Relations Act.

3. The pleadings, together with the affidavits and documents on file show that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment in its favor as a matter of law.

4. Unless the injunctive relief prayed for is granted, plaintiff will suffer immediate and irreparable injury, including denial of statutory rights and serious disturbance of plaintiff's relations with its employees, all to plaintiff's economic disadvantage.

5. The granting of the injunctive relief prayed for will cause less damage to defendants than the denial thereof will damage plaintiff.

6. Plaintiff has no adequate remedy at law.

7. Plaintiff's Motion for Summary Judgment is granted.

8. Defendants' Motion to Dismiss the Complaint is denied.

Order

Plaintiff's motion for summary judgment is granted, and Defendants' motion to dismiss is denied, and it is hereby adjudged, ordered and decreed that defendants, their agents, servants and attorneys are permanently enjoined from carrying out the Board's Decision and Direction of Elections dated January 12, 1968 in Case No. 6-UC-4 [1968-1 CCH NLRB ¶ 22,052] (169 NLRB No. 2), and from conducting the elections directed in the aforesaid Decision and Direction of Elections.

And it is further adjudged, ordered and decreed that the motion of defendants to dismiss the complaint be, and it is hereby, denied.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,744

FRANK W. MCCULLOCH, *et al., etc., Appellants*

v.

LIBBEY-OWENS-FORD GLASS *Co., Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided June 7, 1968

Mr. Laurence H. Silberman, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Hawaii, *pro hac vice,* by special leave of court, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Solomon I. Hirsh,* Attorney, National Labor Relations Board, were on the brief, for appellants.

Mr. Guy Farmer and *Mr. Arnold Bunge* of the bar of the Supreme Court of Ohio, *pro hac vice,* by special leave of court, with whom *Mr. John A. McGuinn* was on the brief, for appellee.

Mr. Denison Kitchel filed a brief as *amicus curiae.*

Mr. Donald J. Sherbondy filed a brief on behalf of PPG Industries, Inc., as *amicus curiae.*

Before BAZELON, *Chief Judge,* EDGERTON, *Senior Circuit Judge,* and TAMM, *Circuit Judge.*

EDGERTON, *Senior Circuit Judge:* The members of the National Labor Relations Board (the Board) appeal from a District Court order enjoining them from holding elections at two plants of the Libbey-Owens-Ford Glass Co. (the Company). We granted a partial stay which permitted the elections but restrained the Board from issuing any order based on them.

Ten of the Company's plants are involved in this litigation. Eight of them are members of a single collective bargaining unit and each of the other two is a separate bargaining unit. All three units are represented by United Glass and Ceramic Workers (the Union). The Union petitioned the Board for a unit clarification order combining the three units. After a hearing, the Board found that either the three existing separate bargaining units or a combined ten-plant unit would be appropriate and ordered elections at the two separate units to ascertain the views of the employees. After our grant of a partial stay the elections were held and the employees in each of the two voted to join the multi-plant unit.

The Company contends that in the absence of a representation question the Board lacks statutory authority to hold elections and to join bargaining units through its unit clarification procedure. 29 C.F.R. § 102.60(b). The Board admits that there is no representation issue and that its action is novel but claims the requisite authority under § 9(b) of the National Labor Relations Act.[1] We intimate no opinion on this claim for we find that the District Court lacked jurisdiction to entertain it.

Judicial review of representation proceedings is very limited. Ordinarily it must await an appeal from an unfair labor practice order. 29 U.S.C. § 159(d) (1958). A District Court may enjoin Board action, especially representation proceedings, only under highly exceptional circumstances.[2] It may correct a Board violation of a "clear, specific and mandatory provision of the Act." *Lawrence*

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[1] 29 U.S.C. § 159(b).

[2] The major case is *Leedom* v. *Kyne*, 358 U.S. 184 (1958), in which the Court first recognized the possibility that in some exceptional circumstances the district court could exercise its general equity jurisdiction. In later cases, the Court has indicated that the exception is very narrow. *McCulloch* v. *Sociedad National de Marineros*, 372 U.S. 10, 16 (1963); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964).

Typographical Union v. *McCulloch,* 121 U.S. App. D.C. 269, 271, 349 F.2d 704, 706 (1965). It may enjoin threatened Board action which violates the Constitution. *Id.* at 273, 349 F.2d at 708. Since Congress expressly restricted judicial review in order to prevent delay in certification and to expedite the settlement of labor disputes,[3] the showing that the Board has violated the Act or deprived a plaintiff of constitutional rights must be strong and clear.

No such violation or deprivation appears in this record. As we said in *Local 130, Internat'l Union of Elec., Radio & Machine Workers* v. *McCulloch,* 120 U.S. App. D.C. 196, 201, 345 F.2d 90, 95 (1965):

> . . . to say that there are possible infirmities in an action taken by the Board by reason of an erroneous or arbitrary exertion of its authority in respect of the facts before it is not to conclude that there is jurisdiction in the District Court to intervene by injunction. For such jurisdiction to exist, the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court. . . .

The Board's action in this case, if at all inconsistent with the Act, was certainly not so "plainly beyond" its bounds or so "clearly in defiance" of it. We therefore remand the case to the District Court with directions to dismiss the complaint.

Reversed and remanded.

TAMM, *Circuit Judge, dissenting:* I would affirm the action of the District Court in this case. Under the authority of *Leedom* v. *Kyne,* 358 U.S. 184 (1958), the District Court had jurisdiction to enjoin the Board from acting in excess of its power and contrary to the provisions of the act. "This Court cannot lightly infer that Congress

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[3] For a review of the legislative history see *Leedom* v. *Kyne,* 358 U.S. 184, 191 et seq. (1958) (Brennan, J., dissenting).

does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom* v. *Kyne, supra* at 190. I believe the Board acted in excess of its authority and in clear contravention of § 9 (c)(1)[1] in conducting an election where, as the Board expressly found in this case, there was no question of representation involved. It is my belief that as an express statutory prerequisite to the holding of any election there must exist a question concerning representation.

It is my view of this case that the Board has arbitrarily exercised a power that has neither been conferred upon it by Congress nor is implied by any phraseology contained in the act. The case illustrates the consistent tendency of administrative agencies to assume and exercise by accretion powers not granted to them specifically or by necessary implication. Undoubtedly in most instances this grasping for non-authorized powers is motivated by a sincere desire to perform more effective and efficient functions. I believe that the courts must insist, however, that the administrative agencies confine their operations specifically to those fields of activity which are bounded by the statutes which create their authority and authorize their operations. If additional power or functions are essential to a proper discharge of an agency's responsibilities, those powers or functions should not be self created but should be sought from the Congress.

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[1] 29 U.S.C. § 159(c)(1) (1964). The statute provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. *If the Board finds upon the record of such hearing that such a question of representation exists,* it shall direct an election by secret ballot and shall certify the results thereof. (Emphasis supplied.)

APPENDIX "C"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 6-UC-4

LIBBEY-OWENS-FORD GLASS COMPANY, *Employer*

and

UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC, and its LOCALS Nos. 1, 5, 9, 19, 33 and 418, *Petitioner*

Decision and Direction of Elections

On January 30, 1939, the National Labor Relations Board certified United Glass and Ceramic Workers of North America, AFL-CIO, CLC,[1] as the bargaining representative of the production and maintenance employees[2] of Libbey-Owens-Ford Glass Company at its plants situated in Shreveport, Louisiana; Ottawa, Illinois; Charleston, West Virginia;[3] and Rossford and East Toledo, Ohio.

On July 13, 1966, the Petitioner filed a petition to clarify the certification by including in the above unit the production and maintenance employees at the Company's plants in Lathrop, California, and Brackenridge, Pennsylvania.

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[1] 10 NLRB 1470. The Petitioner is herein referred to by its present name, although on the date it was certified it was known as Federation of Flat Glass Workers of America, and, in 1941, its name was changed to Federation of Glass, Ceramic and Silica Sand Workers of America.

[2] This certification excluded window-glass cutters who were, and are, represented by the Window Glass Cutters League of America.

[3] The unit as certified included a plant at Parkersburg, West Virginia, but that plant became a separate unit as a result of the Board's decision of April 23, 1941 (31 NLRB 243), and it was sold in 1958.

On September 8 and 9, 1966, a hearing was held before Hearing Officer Herbert Schutzman for the purpose of taking testimony with respect to the issues raised by the petition. All parties appeared and participated at the hearing. On October 18, 1966, the Regional Director for Region 6 issued an order transferring the case to the Board. The Company and the Petitioner thereafter filed briefs with the Board.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

The Company has 10 plants[4] at which it is engaged in the production and fabrication of glass and glass products.[5] Eight of these plants now constitute the multiplant unit in which the Petitioner was certified,[6] while the other two plants, one at Brackenridge and one at Lathrop, constitute

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[4] There are two plants each in Toledo and Rossford, Ohio, and Otawa, Illinois, and one plant in Shreveport, Louisiana, and Charleston, West Virginia, and in addition the plants at Brackenridge and Lathrop here in issue.

[5] The Company owns two other plants, but neither party seeks their inclusion in the multiplant unit, since one is an experimental plant manned solely by technical employees, and the other is a recently acquired subsidiary engaged in the production of plastic and metallic dies, patterns, and molds.

[6] That unit is described as "All production and maintenance employees who are employed at the Company's Plate, Safety and Thermopane Glass plants located at Toledo, Ohio, Rossford, Ohio, and Ottawa, Illinois, and its Window Glass plants located at Charleston, West Virginia and Shreveport, Louisiana, excepting employees in the Window Glass plants who are in the bargaining unit represented by the Window Glass Cutters League of America and excepting supervisors and clerical employees not directly connected with production."

separate bargaining units.[7] As indicated above, the Petitioner now seeks to combine these three separate units into a single Employer-wide unit of all the Employer's glass manufacturing facilities.

The multiplant bargaining history is of long duration, having continued essentially unchanged since at least 1939. Prior to that time the Company had granted voluntary recognition to the Union and had signed collective-bargaining agreements covering multiplant units which varied in scope. The Employer acquired the Brackenridge plant in 1943 and recognized the Petitioner as the representative of the employees at that location, negotiating and signing a number of separate contracts for that unit thereafter. The petition in this case was filed 79 days before the expiration of the then existing Brackenridge contract, and the current contract for that plant was entered into while this proceeding was pending.

In 1962, the Employer built the Lathrop plant, and employees from other plants were afforded an opportunity to work there. All who were selected, whether in layoff status or actively working, went there as new employees, carrying no seniority with them, and all lost their seniority rights at the other plants.[8] In the multiplant negotiations of

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[7] The unit descriptions are:

At *Brackenridge*—"All production and maintenance employees who are employed at the Company's plant located at Brackenridge, Pennsylvania, excepting supervsiors, and clerical employees not directly connected with production."

At *Lathrop*—"All hourly-paid production and maintenance workers employed by the Company at its Lathrop, California plant, but not including salaried employees, guards, janitors, office clerical workers, or any supervisory employees with the right to hire, fire, or otherwise discipline employees or effectively recommend such action."

[8] Employees who transferred to Lathrop did retain seniority for purposes of certain vested pension rights and, under a later agreement, for vacation and insurance benefits.

1961, the Union requested inclusion of the Lathrop plant in the multiplant unit, but the Company refused, and a multiplant contract was signed which expires October 25, 1968. Eventually the Petitioner was recognized as representative of the employees at the Lathrop plant and the present contract expires June 19, 1969.[9] In 1965, during multiplant negotiations, the Petitioner for the first time sought the inclusion of Brackenridge as well as Lathrop in the multiplant unit, and again the Employer rejected the requested expansion.

It is apparent that all the plants involved are engaged in essentially the same basic operations in that all are producing and fabricating glass and/or glass products. Of the eight in the multiplant unit, five produce raw plate glass and fabricate it, while the other three are engaged solely in fabrication. The Brackenridge plant is also engaged in fabrication from raw glass which is obtained both from producing plants within the multiplant unit and from other suppliers. The sole difference between Brackenridge and the other plants is that Brackenridge, in addition to making other products which are typically multiplant operations, is the only plant which fabricates filmed surface glass products and mirrors. The Lathrop plant uses a new and different method of producing glass known as the new float process, and fabricates it into solid safety curved side and back lights for automobiles and cut sizes for the jobbers trade. While there is no basis for concluding that the operations of the various plants are integrated, there is also no basis for finding any greater operational or administrative integration among the eight plants in the multiplant unit than between the Brackenridge and Lathrop

[9] The contract provides that if Lathrop were added to the multiplant unit, the Lathrop agreement would terminate on October 25, 1968, which is the date for the expiration of the multiplant contract, and that if the Petitioner's demand were not resolved to its satisfaction by June 19, 1967, the Petitioner was free to strike on this issue alone.

plants, individually or collectively, and the other eight plants or any of them.

It is clear from the above facts that separate plant units are presumptively appropriate. It is also apparent that a multiplant unit may be equally appropriate where, as is true of the existing 8-plant unit here, it is agreed to by the parties. Of course, an employer-wide unit is also presumptively appropriate,[10] but the Board has consistently held that separate historical units do not automatically merge where the operations are not integrated[11] or there is no indication that the parties mutually intended to effect a consolidation thereof.[12] Not only has the Employer failed to agree to such a merger, it has vigorously opposed it on various grounds.

The Employer contends that both the multiplant unit and the Brackenridge unit include guards as defined in the Act, and it contends that neither of these units may be clarified by the Board because to do so would be in contravention of Section 9(b) of the Act. That section precludes the Board from finding appropriate any unit which includes with

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[10] See *Owens-Illinois Glass Co.*, 136 NLRB 389, 392.

[11] *Bath Iron Works Corporation*, 154 NLRB 1069.

[12] See *Univac Division, Sperry Rand Corporation*, 158 NLRB 997; *Remington Office Machines, Minneapolis Branch, Division of Sperry Rand Corporation*, 158 NLRB 994. Compare *Chrysler Corporation*, 42 NLRB 1145, in which the parties bargained jointly for and applied the terms of one contract to all plants.

We note that the cases cited by the Company herein are inapposite, some because they involve situations where a union was seeking to add previously unrepresented employees to an existing unit as an accretion thereto and others because they sought clarification of uncertified units at a time when the Board declined to give such relief under a now overruled holding. None of those noted by the Employer involved facts like those herein, where a labor organization seeks clarification of a unit in which it was certificated by the inclusion of another existing unit or units in which it was the incumbent, recognized representative.

other employees any individual employed as a guard.[13] The Union has stated, however, that it seeks clarification of its multiplant unit with the exclusion, *inter alia,* of such categories as the Board, either by statute or by decision, customarily excludes from production and maintenance units. We construe this statement as an acknowledgment by the Union that the guards may not be included in a unit found appropriate by the Board and a request that the Board clarify the unit or units by excluding them.[14] Accordingly, we shall clarify the multiplant unit and the unit of Brackenridge employees by excluding therefrom any individuals who are employed as guards as defined in the Act.

The Company's main contentions are that the proper procedure would have been a representation petition under Section 9(c), which would, however, have been barred by existing contracts, and that the Union has adopted the wrong method. Thus, the Employer argues that in a 9(c) proceeding the Board could determine the inclusions and exclusions of such a unit and arrange an election to provide the employees an opportunity to decide "whether they want union representation and who, if anyone, should represent them" as well as "whether they want to all be included in the same unit or be represented in separate units." It argues that the procedure for clarification of units was never intended to accomplish the combination of existing units but only to resolve questions concerning whether disputed job classifications should be included in

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[13] We note that the Employer's brief incorrectly states that Section 9(b)(3) of the Act disqualifies a union as the representative of production and maintenance employees if it also represents guards. On the contrary, that section of the Act provides that such a union may not be certified as representative of a guard unit, but permits it to continue to represent other employees.

[14] In this connection, we note that in any event the Board may so clarify the existing certified unit on its own motion as part of its authority to police its certifications. *Briggs Manufacturing Company,* 101 NLRB 74, footnote 4, at 76.

or excluded from a unit. It appears that the basic reason underlying the Employer's opposition to this procedure is its view that the employees should be permitted to decide whether they want to be included in the same unit or represented in separate units.

We find no merit in the Employer's position that the Union was required to resort to a representation proceeding to resolve the issue. Although it may well be that the Board would reach and determine the unit issue here posed in such representation case, seeking an election that is timely with respect to the existing contract, there is no reason why that is the only route for the resolution of the question. It is certainly not the best route either, where, as in this case, there is no actual question concerning representation because the Employer does not dispute the Union's representative status at any of the plants.

If the overall 10-plant unit sought and the existing single-plant units are all presumptively appropriate, it is not a difficult matter for the Board to make available to the employees in each of the hitherto separately represented plants an opportunity to express their preferences in a secret ballot election between continued representation in their one-plant units, or addition to the multiplant unit. And the current contracts for those separate plants interpose no bar to such separate self-determination elections because the purpose of this proceeding is not to affect existing contracts, but to mark out the appropriate unit for future bargaining. Moreover, the Brackenridge contract was entered into after the institution of these proceedings, and the Lathrop contract expressly provides for adoption of the overall contract's terminal date if Lathrop were added to the multiplant unit, thus revealing the parties' acceptance of the possibility that Lathrop might be added to the multiplant unit prior to that contract's termination.

We conclude from the above review of outstanding principles and the arguments herein that the Petitioner has

adopted a procedure which would appear to encompass its desired relief. We are unable to perceive any reason why a further delay should be required where, as here, no question of the presumptive propriety of the employer-wide unit exists and only the technical problems of bargaining history and employer opposition have prevented its estabishment. The presently existing 8-plant unit encompasses plants which are between 4 and 986 miles from the Employer's home office in Toledo, Ohio, and hence is not based on any geographic considerations, while the Brackenridge and Lathrop plants are 240 and 2,367 miles from Toledo, respectively. As previously set forth, there is generally no greater functional or operational integration between the plants in the multiplant unit than between either of the two disputed plants and the others. Nor, in considering the equities of the positions of the Employer and of the Union, does there appear to be any justification, in the circumstances here, for affording absolute power to either one to compel the other to bargain in the three historical units rather than combining them into one presumptively appropriate employer-wide unit of glass industry plants. Thus the existing multiplant unit is virtually employer-wide, and there is no question that the Petitioner represents the employees at all the 10 plants. In a dispute such as this, it appears to us that the wishes of the disputed employees themselves should be solicited and that some means should be afforded by which they may indicate their desires. Indeed, such a need is suggested by the Employer's criticism of a possible grant of the Union's request in its argument that a proceeding under 9(c) would give such an opportunity.[15] Further, an outright rejection of this petition

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[15] The Employer's argument is that an election would be proper to determine unit placement of the employees of the two disputed plants only if a rival labor organization were seeking to represent the two plants on some other basis and the employees were given a choice among at least two unions and neither. We see no sound reason to limit our utilization of a self-determination election to such circumstances.

would leave the parties with no early source of relief by which the unit issue may be resolved and would serve merely to prolong the labor dispute. Such a result would unquestionably fail to promote the purposes and policies of the Act[16] and would constitute a failure by this Board to fulfill its statutory function to decide in each case the appropriate unit and to afford a peaceful means for doing so.

Contrary to the view of our dissenting colleagues, we are not abrogating our statutory duty to determine the appropriate unit by using this means to ascertain the desires of the employees before finally deciding the appropriate unit or units here. On the contrary, having concluded that either an employer-wide or the separate plant units now existing may be appropriate, we believe it entirely proper to take into consideration the wishes of the employees before determining in which unit or units future bargaining shall take place.

In making findings as to appropriate units, the Board reviews all relevant factors. There is nothing in the statute to prevent our giving some weight to employee preference in reaching a final decision. Rather, we view such wishes as one of many relevant facts to be considered. Where, as here, employee desires become relevant, the Board, under its inherent investigatory powers, may take appropriate measures, including the holding of elections, to ascertain what the facts may be. The Board has long given some weight to employee expressions of preference determined through the election procedure, as illustrated by what have come to be known as *Globe* or self-determination elections. Such elections are uniformly conducted among the disputed employees and have received consistent acceptance not-

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[16] Section 1(b) of the Act provides that: "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . ."

withstanding that nowhere in the statute are they mentioned or specifically authorized, except for the Section 6(b) requirement, adopted in 1947, that the Board utilize its previously existing self-determination election procedure in certain situations involving professional and craft employees. Far from disapproving this use of employee preference as a factor and the means adopted to ascertain it, these requirements indicate Congressional approval thereof.

As is clear from the above discussion, we are persuaded that the Board's authority and practice in determining units and conducting elections, including the weight given to employee wishes as one fact and the holding of self-determination elections as an investigatory, fact-finding tool, are firmly based on the Act. And we are satisfied that our present decision is within our statutory competency. There will be time enough to treat with the other questions which our dissenting members forsee if they in fact arise. We deal only with the immediate question presented to us, and we do so by using a new combination of long-established procedures, in order to put at rest a controversy that has admittedly been disturbing the relations of the parties for a number of years.

In view of the above, we shall direct that elections be conducted among the employees in the following voting groups:

(1) All production and maintenance employees who are employed at the Company's plant located at Brackenridge, Pennsylvania, excepting clerical employees not directly connected with production, and guards and supervisors as defined in the Act.

(2) All hourly-paid production and maintenance workers employed by the Company at its Lathrop, California, plant, excluding salaried employees, guards, janitors, office clerical workers, and supervisors as defined in the Act.

The question on the ballot shall inquire whether or not the employees now separately represented by the Petitioner

wish to be represented by that Union as part of the multiplant unit now consisting of the Employer's glass plants at Toledo and Rossford, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana. If a majority of the valid votes cast in either group are in favor of addition to the multiplant unit, the employees in such group shall have indicated their wish to be part thereof and we find that such an enlarged multiplant unit is appropriate. In the event a majority of the valid votes cast in either group are against addition to the multiplant unit, the employees in that group shall have indicated their desire to continue to be represented separately, and the Regional Director will issue a certification of results of election to that effect. The election shall be conducted pursuant to National Labor Relations Board Rules and Regulations, Series 8, as amended, to the extent they provide applicable procedures.

Order

IT IS HEREBY ORDERED that the certification of representatives issued to the predecessor of United Glass and Ceramic Workers of North America, AFL-CIO, CLC, on January 30, 1939, be, and it hereby is, clarified by excluding therefrom individuals employed as guards within the meaning of the Act.

IT IS HEREBY FURTHER ORDERED that the unit of production and maintenance employees at the Employer's Lathrop, California, plant, represented by the said Union and its Local No. 418, be, and it hereby is, clarified by excluding therefrom individuals employed as guards within the meaning of the Act.

Direction of Elections

Elections by secret ballot shall be conducted among the employees in the groups found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 6 shall direct and super-

vise the elections subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[17] Those eligible shall vote whether or not the employees now represented separately by United Glass and Ceramic Workers of North America, AFL-CIO, CLC, Locals Nos. 33 and No. 418, respectively, desire to be represented by the said International and its various Locals as part of the multiplant unit now consisting of the Employer's glass plants at Toledo

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[17] Election eligibility lists, containing the names and addresses of all the eligible voters in Voting Groups (1) and (2) must be filed by the Employer with the Regional Director for Region 6 within 7 days after the date of this Decision and Direction of Elections. The Regional Director shall make the lists available to all parties to the elections. No extension of time to file these lists shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the elections whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

and Rossford, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana.

Dated Washington, D. C., Jan. 12, 1968

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FRANK W. MCCULLOCH, *Chairman*

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GERALD A. BROWN, *Member*

.....

SAM ZAGORIA, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Fanning and Member Jenkins, concurring in part and dissenting in part:

We concur with our colleagues in clarifying the existing multiplant unit to the extent of excluding therefrom individuals employed as guards. Our colleagues, however, are also directing elections aimed solely at merging separate plant units with the multiplant unit. They devise elections whereby employees at two plants in widely separated States—already represented by the petitioning Union in separate plant units—may vote whether they wish to be included in the existing 8-plant unit represented by this same Union.

Although our colleagues readily recognize that no established principles cover this situation, they ignore the fact that the void they undertake to fill—"to mark out the appropriate unit for future bargaining" without affecting existing contracts and, obviously, without reference to a representation issue—is a statutory void.[18] Authorization

[18] Recent Annual Reports of this Board have said: "Incident to its authority to conduct elections, *the Board* has the power to determine the unit of employees appropriate for collective bargaining . . ." (Emphasis supplied.) See *1964, 1965, 1966 Annual Reports, Section V: Representation Cases.*

for this type of election is completely lacking under the Act. Representation is not in issue in this case. Unit scope is.[19]

One cannot quarrel with the majority statement that "it is not a difficult matter" for the Board to make available a secret ballot election tailored to this situation. Mechanically this is quite true. What is difficult is to find in the Act the statutory authority for so doing in these circumstances, and hence for the expenditure of funds for this purpose. There simply is no present statutory authority for permitting employees to decide, in a representational vacuum, which *contract* unit they wish. True, in "Globe," or so-called self determination elections, the Board has long given weight to employee expression of unit preference *in connection with selection of a bargaining representative.* This is because a question concerning representation exists and Section 9(c)(1) of the Act specifically authorizes an election in those circumstances. The election is held to select a bargaining representative, and only by reason of the selection of a particular representative rather than another representative does the employee register a preference as to unit. As for the 1947 amendments to Section 9(b) which provide for a vote on unit by professionals, and a vote against separate representation by craft employees in certain circumstances, these provisions are actually limitations imposed by Congress on the Board's authority to

[19] As the apparent intent is to have the employees concerned decide this question of merger of units—a goal with considerable merit—we have some difficulty understanding why they do not have *all* employees affected express a choice, thus voting the employees in the multiplant unit as well. These employees may not wish to have their 8-plant unit further enlarged, one of the effects of which is to increase the problem of changing their bargaining representative in future years, just as the employees in the single plant units may not wish to be overwhelmed from a voting standpoint by inclusion in a unit of many plants located in four additional States.

define units—limitations within the overall pattern of Section 9 of the Act specifying the circumstances in which elections shall be held. This pattern is further exemplified by the 1947 provision in then Section 9(e)(1), authorizing elections in affected units to determine union-security authorization, and in then Section 9(e)(2), authorizing similar elections for union-security deauthorization. Authority for the former has since been withdrawn by Congress—again within the statutory pattern of specifying what types of election the Board shall hold. These statutory realities are ignored by the majority.

The existence of this void in the statutory scheme is not denied by our colleagues. Instead they speak of the "technical problems of bargaining history and employer opposition" having prevented establishment of a presumptively appropriate employer-wide unit, and perceive no reason for further delay in supplying a solution to the problem, or for leaving the parties with no early source of relief. At best it seems cavalier to treat employer opposition to a request for bargaining on a country-wide, multiplant basis as a mere technical problem. It is a factor to be seriously considered. The mere fact that the Employer and the Union here taken opposite positions on the question of enlarging the unit for *future* bargaining does not, to our way of thinking, justify rationalizing the existence of the requisite authority for solution by the employees.

One wonders whether our colleagues have considered what action they would take with respect to various problems that may arise within the existing statutory framework. Suppose that within the next few months a rival union enters the pictures requesting representation in any of these existing units, at an appropriate time with respect to the existing contracts. In view of Section 9(c)(3), which prohibits an election in any bargaining unit or subdivision within which a *valid election* shall have been held in the previous 12-month period, will our colleagues process such

petitions, saying that the elections now directed where not "valid" elections within the meaning of 9(c)(3)? Or, will they say these elections were not the sort contemplated by Section 9(c)(1)? But, if the latter, where then in this Act is there so much as a suggestion of authority for elections simply to decide unit questions? Or, suppose that a rival union, armed with a 30 percent showing, appears on the scene now and seeks to participate in the elections here directed? Is it to be denied the right to do so under the Board's contract bar rules, while, at the same time, the bar problem is brushed aside so far as employee determination of unit is concerned?

If Congress wished unit determinations to be made through Board processes when the context is one of threatened strikes and no question of representation exists, it can easily so provide. It can also easily provide that such non-representational determinations may be settled at any time through Board-directed elections. But it has not so far done this, and as matters stand, the merger of units is left to voluntary bargaining by the parties unless the choice of a bargaining representative is in issue.

Accordingly, we dissent from the majority opinion insofar as it directs elections in this unit clarification proceeding.

Dated, Washington, D. C., Jan. 12, 1968

JOHN H. FANNING,
Member

HOWARD JENKINS, JR.,
Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX "D"

28 U.S.C. § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

29 U.S.C. § 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

DETERMINATION OF BARGAINING UNIT BY BOARD

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit in-

cludes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

HEARINGS ON QUESTIONS AFFECTING COMMERCE: RULES AND REGULATIONS

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

PETITION FOR ENFORCEMENT OR REVIEW; TRANSCRIPT

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SECRET BALLOT; LIMITATION OF ELECTIONS

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

UNITED STATES OF AMERICA ★ NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

PURPOSE OF THIS ELECTION This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election.

SECRET BALLOT The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election. Your attention is called to Section 12 of the National Labor Relations Act:

ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An agent of the Board will hand a ballot to each eligible voter at the voting place. Mark your ballot in secret in the voting booth provided. DO NOT SIGN YOUR BALLOT. Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of an agent of the Board.

A sample of the official ballot is shown at the center of this Notice.

ELIGIBILITY RULES Employees eligible to vote are those described under VOTING UNIT in this Notice of Election, including employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also including employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge MUST be made before the voter has deposited his ballot in the ballot box.

AUTHORIZED OBSERVERS Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters, (c) challenge voters and ballots, and (d) otherwise assist the Regional Director or his agent.

INFORMATION CONCERNING ELECTION The Act provides that only one valid representation election may be held in a 12 month period. Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any question concerning the holding of an election in the voting unit, or eligibility rules, may do so by communicating with the Regional Director or his agent in charge of the election at [illegible] Penn Shore, Regional Director, [illegible] Federal Building, [illegible] Pa. 15[illegible]

VOTING UNIT

Those **ELIGIBLE** to vote are all production and maintenance employees who were employed at the Libbey-Owens-Ford Glass Company plant located at Brackenridge, Pennsylvania, during the payroll period ending January 7, 1968.

Those **NOT ELIGIBLE** to vote are clerical employees not directly connected with production, and guards and supervisors as defined in the Act.

TIME AND PLACE OF ELECTION

DATE: Wednesday, March 20, 1968

TIME: 6:00 a.m. to 9:00 a.m.
and
1:30 p.m. to 5:00 p.m.

PLACE: Adjacent to Voter Department

NOTE: If a majority of the valid votes cast in the above voting group are in favor of addition to the multiplant unit now consisting of the Employer's glass plants at Toledo and Beaufort, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana, the employees in the above voting group shall have indicated their wish to be part thereof. In the event a majority of the valid votes cast in the above voting group are against addition to the said multiplant unit, the employees in the above voting group shall have indicated their desire to continue to be represented separately.

UNITED STATES OF AMERICA
National Labor Relations Board
OFFICIAL SECRET BALLOT
FOR CERTAIN EMPLOYEES OF
LIBBEY-OWENS-FORD GLASS COMPANY, Brackenridge, Pa. now separately represented by
UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC and L.U Local 33

SAMPLE

Do you wish to be represented for purposes of collective bargaining by -
UNITED GLASS AND CERAMIC WORKERS OF NORTH AMERICA, AFL-CIO, CLC
and its various Locals

as part of the multiplant unit now consisting of the Employer's glass plants at Toledo and Beaufort, Ohio; Ottawa, Illinois; Charleston, West Virginia; and Shreveport, Louisiana?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board agent for a new one.

RIGHTS OF EMPLOYEES

Under the National Labor Relations Act, employees have the right:

- To self-organization
- To form, join or assist labor organizations
- To bargain collectively through representatives of their own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refrain from any or all such activities

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under the Act and wants both labor and management to know what is expected of them when a NLRB election.

If agents of either labor or management interfere with your right to a free, fair and honest election, the election can be set aside by the Board.

The following are examples of conduct which interferes with the rights of employees and may result in the setting aside of the election. Where appropriate the Board provides other remedies, such as reinstatement with backpay for employees fired for exercising their rights:

- Making threats of loss of jobs or benefits by a party capable of carrying out such a threat
- Firing employees or causing them to be fired to encourage or discourage union activity
- Making promises of promotions, pay raises, or other benefits, to influence an employee vote, by a party capable of carrying out any such promise
- Making threats of physical force or violence to employees to influence their vote
- Making misstatements of important facts where another party does not have a fair chance to reply
- Making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election
- Inciting racial or religious prejudice by inflammatory appeals
- Exerting repeated pressure by persons or groups not themselves involved in the election which tend to create fear of job loss, violence, or other trouble

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this agency in maintaining basic principles of a fair election as required by law.

NATIONAL LABOR RELATIONS BOARD
an agency of the
UNITED STATES GOVERNMENT

WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE

APPENDIX "F"

Different Formulations of the Leedom v. Kyne Rule in the Various Circuit Courts of Appeal

First Circuit

1. Suprenant Mfg. Co. v. Alpert, 318 F. 2d 396, 53 LRRM 2405 (1st Cir. 1963)

> ". . . The type of Board error committed here, if any, was one of discretion subject to ordinary process of review rather than action beyond the 'clear and mandatory' statutory limitation of the Board's powers as in appellant's case of *Leedom* v. *Kyne* . . ."

Second Circuit

1. Herald Co. v. Vincent, 392 F. 2d 354, 67 LRRM 2834 (2nd Cir. 1968)

> "A district court may intervene when the Board has acted clearly contrary to the statute, Leedom v. Kyne, 358 U.S. 184."

2. McLeod v. Local 476, Int'l Bhd. of Indus. Workers, 288 F. 2d 198, 47 LRRM 2761 (2nd Cir. 1961)

> "In that case [Leedom v. Kyne] the Board had proceeded in direct and conceded violation of the statute"

3. Local 1545, Carpenters v. Vincent, 286 F. 2d 127, 47 LRRM 2305 (2nd Cir. 1960)

> "To be sure the distinction between violation of a not so clear statutory command is neither completely satisfying nor, save where violation is concerned, as it was in Leedom v. Kyne, readily applied. However, the distinction seems to us to have been made by the Supreme Court in carving out what was intended to be a narrow exception to a rule that is founded on important considerations of history and policy."

Third Circuit

1. Firestone Tire & Rubber Co. v. Samoff, 365 F. 2d 625, 63 LRRM 2077 (3rd Cir. 1966)

> "In the Kyne case . . . the ruling was that a federal district court had jurisdiction of an original action to set aside a determination by the Board because it was 'made in excess of its delegated powers and contrary to a specific prohibition of the Act.' "

Fourth Circuit

1. Greensboro Hosiery Mills v. Johnston, 377 F. 2d 28, 65 LRRM 2299 (4th Cir. 1967)

> "The other decision in which the district court's assertion of jurisdiction was upheld was Leedom v. Kyne, 358 U.S. 184. However, there involved was a clear violation by the Board of a provision of the Act."

Fifth Circuit

1. Boire v. Miami Herald, 343 F. 2d 17, 58 LRRM 2585 (5th Cir. 1965), cert. den., 382 U.S. 824.

> "The courts have generally interpreted Kyne as sanctioning the use of injunctive powers only in a very narrow situation in which there is a 'plain' violation of an unambiguous and mandatory provision of the Act . . . This exception has been applied to an affirmative requirement of the Act as well as a statutory prohibition."

Sixth Circuit

1. Modern Plastics Corp. v. NLRB, F. 2d , 69 LRRM 2133 (6th Cir. 1968)

> " . . . Leedom v. Kyne indicates that the District Court at least had jurisdiction to determine if the contested Board action was plainly beyond the bounds of the Act or clearly in defiance of it."

2. Uyeda v. Brooks, 365 F. 2d 326, 62 LRRM 2831 (6th Cir. 1966)

> "The basic rule as laid down by the Supreme Court in Leedom v. Kyne . . . is that District Courts have jurisdiction over representation matters only when it is shown that the National Labor Relations Board has acted in excess of its delegated powers or in contravention of a specific prohibition of the National Labor Relations Act".

3. American Metal Prods. Co. v. Reynolds, 332 F. 2d 434, 56 LRRM 2333 (6th Cir. 1964)

> "It was held in that case [Leedom v. Kyne] that although Section 10(f) of the Act provides that exclusive review on the application of a person aggrieved of final orders of the Board is vested in the Court of Appeals, the District Court had jurisdiction to strike down an order of the Board made in excess of its delegated powers and contrary to a specific violation of the Act."

4. Eastern Greyhound Lines v. Fusco, 310 F. 2d 632, 51 LRRM 2661 (6th Cir. 1962)

> "Under applicable decisions, it seems now to be clear that unless the Board's action is so patently without legality as was the case in Leedom v. Kyne . . . the route of review of a certification order of the Board is through Sections 9(d) and 10(e) of the Act . . ."

Seventh Circuit

1. Local 714, IBT v. Madden, 343 F. 2d 497, 58 LRRM 2796 (7th Cir. 1965), cert. den. 382 U.S. 822

> "A prerequisite to review of the Board's order is the determination made by the District Court that there is a violation of a clear and mandatory provision of the Act. In Kyne . . . the Board admitted that the ac-

tion of which the Union there complained of did contravene a specific prohibition of the Act."

Eighth Circuit

[No applicable decisions]

Ninth Circuit

1. Potter v. Castle Construction Co., 355 F. 2d 212, 61 LRRM 2119 (9th Cir. 1966)

"The first exception was enunciated in Leedom v. Kyne . . . In that case . . . the Board acted outside the scope of its authority 'and contrary to a specific prohibition in the Act' . . . We attach great significance to the fact that the Act specifically forbade the Board's action."

2. Department Store Employees v. Brown, 284 F. 2d 619, 47 LRRM 2145 (9th Cir. 1960), cert. den., 366 U.S. 934

"Under ordinary circumstances the decisions of the National Labor Relations Board in representation proceedings are reviewable only in the Courts of Appeal. The District Courts have no jurisdiction unless there is a showing of unlawful action by the Board and resulting injury, by departure from statutory requirements, or those of due process."

Tenth Circuit

1. Boyles Galvanizing Co. v. Waers, 291 F. 2d 791, 48 LRRM 2378 (10th Cir. 1961)

"It is also well established that unless the Board engages in some unlawful action by departure from statutory requirements or those of due process, a federal district court does not have jurisdiction in an action brought to contest National Labor Relations Board decisions in Section 9 representation proceedings."

District of Columbia Circuit

1. Typographical Union v. McCulloch, 349 F. 2d 704, 59 LRRM 2162 (D. C. Cir. 1965)

> "A District Court has jurisdiction to correct a violation by the Board of a clear, specific and mandatory provision of the Act.[3]
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>
> [3] A mere allegation in the complaint that the Board has violated the Act does not confer jurisdiction. The violation must be proved."

2. Local 130, IUE v. McCulloch, 345 F. 2d 90, 58 LRRM 2699 (D. C. Cir. 1965)

> "For such jurisdiction to exist the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court even before the Board's own processes have run their course."

3. Miami Printing Pressmen's Local 46 v. McCulloch, 322 F. 2d 993, 53 LRRM 2791 (D. C. Cir. 1963)

> "We are unable to read the Court's decision in Leedom v. Kyne as limited to the negatively worded prohibition there involved. If, after the Board finds that a question of representation exists, and an election is held, the requirement that it 'shall' certify the results is mandatory, then a failure to so certify would be prohibited by the Act and in excess of the Board's powers. A party would be as aggrieved by such a failure as by an act of the Board contrary to an express prohibition."

4. Milk Drivers Local 98 v. McCulloch, 306 F. 2d 763, 50 LRRM 2322 (D. C. Cir. 1962)

> "Our court has paraphrased the Supreme Court opinions bearing on District Court jurisdiction in a rep-

resentation proceeding as requiring a showing of unlawful action by the Board, with resulting injury, by 'departure from statutory requirements or from those of due process' ".

5. Leedom v. Norwich Printing Union, 275 F. 2d 628, 45 LRRM 2750 (D. C. Cir. 1960), cert. den., 362 U.S. 969

"Our question is not whether on the one hand the unit sought by Local 494 and the International, or, on the other hand the unit fixed by the Board, is the appropriate bargaining unit, but whether the Board in reaching its decision as to the unit disregarded any statutory limitation upon the discretion vested in the Board by Section 9(b) of the Act; that is, whether the craft employees were denied a statutory right. If the latter, the District Court, under the authority of Leedom v. Kyne . . . should be upheld in granting the preliminary injunction and not dismissing the complaint."

6. Tool Craftsmen v. Leedom, 726 F. 2d 514, 45 LRRM 2827 (D. C. Cir. 1960), cert. den., 364 U.S. 815

"The jurisdiction of the District Court to grant relief in this original equity suit depends upon a clear showing that the Board acted in excess of delegated powers and contrary to a specific prohibition in the Act."

7. Leedom v. IBEW, 278 F. 2d 237, 45 LRRM 3005 (D. C. Cir. 1960)

"To obtain review of such determination [a representation proceeding] in an original equity suit in the District Court 'there must be a showing of unlawful action by the Board and resulting injury by way of departure from statutory requirements or from those of due process.' "

8. National Biscuit Division v. Leedom, 265 F. 2d 101, 43 LRRM 2464 (D. C. Cir. 1959), cert. den. 359 U.S. 1011

> "... The Board went beyond the area of its expertise and discretion and produced the sort of 'unlawful action and resulting injury by way of departure from statutory requirements or from those of due process' for which we granted relief in Leedom v. Kyne ..."

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 627

LIBBEY-OWENS-FORD GLASS COMPANY, PETITIONER

v.

FRANK W. MCCULLOCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner's employees are represented for collective bargaining purposes in three different bargaining units by the United Glass & Ceramic Workers of North America, AFL-CIO. One unit covers eight plants, and there are separate units for plants at Brackenridge, Pennsylvania, and Lathrop, California. Upon a petition filed by the Union, the Board directed an election among the employees at the latter plants to determine whether they wished to be included in a single bargaining unit covering all ten

plants, or to continue to be separately represented. 169 NLRB No. 2 (Pet. App. 15a-30a).

The company then brought this suit in the district court to enjoin the elections and to prevent the Board from changing the existing bargaining units, contending that the Board lacks authority to conduct an election merely for unit clarification purposes. The district court enjoined the Board from conducting the elections and from issuing an order clarifying the unit (Pet. App. 10a). Pending appeal, the court of appeals modified the injunction to permit the Board to proceed with the elections,[1] but continued to enjoin the Board from issuing an order of unit clarification (Pet. App. 11a). Thereafter, the court of appeals (Judge Tamm dissenting) held that the district court had no jurisdiction to entertain the suit and directed dismissal of the complaint.[2]

2. The sole question presented is whether under the principles enunciated in *Leedom* v. *Kyne*, 358 U.S. 184, the district court had jurisdiction to review the Board's action.[3] It is well settled that *Lee-*

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[1] In the ensuing elections, the employees at the two plants voted to join the other eight plants to form a single ten-plant unit.

[2] Petitioner applied for rehearing and rehearing *en banc* and for stays in the court of appeals and this Court, all of which were denied.

[3] On three recent occasions this Court has declined to review court of appeals decisions denying the district court's jurisdiction to review comparable claims that the Board acted beyond its statutory authority. *Kingsport Press, Inc.* v. *McCulloch*, 379 U.S. 931; *Machinery etc. Local Union No. 714* v. *Madden*, 382 U.S. 822; *Miami Herald Pub. Co.* v. *Boire*, 382 U.S. 824.

dom v. *Kyne*, creates only a narrow exception to the general rule that the district courts have no jurisdiction to review Board actions in representation proceedings. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 480-481; *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 17; cf. *Brotherhood of Railway Clerks* v. *Employees Association*, 380 U.S. 650, 659-660. *Kyne* held only that the district court has jurisdiction where a suit is "one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." In *Kyne* the Board concededly violated a specific statutory prohibition [4] by placing professional and nonprofessional employees in the same bargaining unit without first affording the former a separate vote. Moreover, the court emphasized that the absence of district court jurisdiction in that case "would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control * * * to protect and enforce that right" (*id.*, at 190).[5]

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[4] Section 9(b)(1) of the Act provides that, in determining the unit appropriate for collective bargaining purposes, "the Board shall not * * * decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in that unit."

[5] In *Kyne*, due to the peculiar circumstances of that case (see 249 F. 2d 490, 492 (C.A. D.C.)), the normal review procedure did not provide an effective means of obtaining review of the unit issue, thereby necessitating district court relief in order to protect the statutory right accorded the professional employees.

The Act, however, does not expressly preclude the Board from utilizing an election for the purposes of clarifying or modifying a prior bargaining unit determination. Section 9(c)(1) (Pet. App. 32a-33a) provides that the Board must conduct an election if it finds after a hearing that a question of representation exists; but it does not prohibit the Board from holding elections in other circumstances. On the contrary, the Board's broad power under Section 9(b) (Pet. App. 31a) to establish the appropriate bargaining unit suggests that it may use any reasonable means, including an election, to exercise that power properly.[6] Cf. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 267-268. See, also N.L.R.B. Rules and Regulations, 29 CFR § 102.63(b).[7]

Moreover, here petitioner has an adequate means of obtaining review of its contentions in the court of

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[6] Since the Board's power to hold the unit clarification election here is derived from Section 9(b) and not Section 9(c)(1), there is no relevance to petitioner's argument that the court below ignored the express requirement of a question concerning representation imposed by the latter section (Pet. 10-14, 17-18). Similarly, petitioner's contention that there is a conflict between the court below and other courts of appeals in the application of *Kyne, supra* (Pet. 20-21) rests on its erroneous assumption that the court below was focusing on Section 9(c)(1) in concluding that the Board's action was not "plainly" or "clearly" in contravention of the Act. Finally, since only the International Union was certified as the representative for each of the units involved, there is no substance to petitioner's further contention (Pet. 7, 14) that the Board's action would result in a new and different representative.

[7] The cases cited by petitioner at Pet. 4 follow *The Bell Telephone Co. of Penn.*, 118 NLRB 371, which was overruled by *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521.

appeals. If the Board issues its unit clarification order combining the ten plants into a single unit, petitioner may refuse to bargain for that unit. If the Union then files an unfair labor practice charge and the Board issues an order directing petitioner to bargain, petitioner may then challenge the unit determination in the court of appeals as an incident to judicial review of the Board's order. This is the normal procedure by which unit determinations of the Board are reviewed (see *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-480), and it would provide petitioner with an ample opportunity to litigate its contentions.[8]

[8] There is no substance to petitioner's contention (Pet. 19) that the statutory review procedure is limited to "cases where the Board acts within its statutory authority but may have made an erroneous assessment of the facts or an erroneous application of the law to the particular facts before it." See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, is distinguishable for there, unlike here, the administrative remedy afforded no redress for plaintiff's claim (see L. Jaffe, *Judicial Control of Administrative Action* (1965), pp. 426-428).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1968.

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DENIED